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No. 75-1502

In the Supreme Court of the United States

OCTOBER TERM, 1975

ECEE, INC., ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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1. On December 26, 1972, petitioners filed with the Federal Power Commission applications for certificates of public convenience and necessity authorizing them to sell natural gas from offshore Louisiana to Sea Robin Pipeline Company. Invoking the Commission's "optional procedure" for certificating new producer sales of natural gas (18 C.F.R. 2.75),[1] the applications requested an initial price of 35 cents per Mcf together with fixed escalations of 2.5 cents per Mcf every 36 months for the duration of the 20-year contracts.

The Commission, in September 1973, issued the certificates requested by petitioners and, in November 1973, denied an application for rehearing filed by intervenor

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[1]See *Federal Power Commission* v. *Moss*, No. 74-883, decided March 3, 1976.

American Public Gas Association ("APGA"). APGA filed a petition for review of the Commission's order in the United States Court of Appeals for the District of Columbia Circuit.[2]

The Commission thereafter issued an order in an unrelated proceeding establishing a nationwide just and reasonable ceiling rate of 42 cents per Mcf for certain sales of "new" natural gas.[3] Petitioners thereupon filed motions to withdraw their certificates of public convenience and necessity, together with applications to substitute new certificates for sales at the newly established national ceiling rate. Petitioners asserted a right to withdraw their certificates under 18 C.F.R. 2.75(n), which permits the termination of natural gas deliveries that have been commenced after the filing of an application for optional procedure certification if the underlying contract is terminated "prior to the issuance by the Commission of a final order upon review of such application * * *." Petitioners alleged that their contracts with Sea Robin had been terminated and that the Commission's September 1973 order issuing certificates of public convenience and necessity to petitioners was not yet final because it was pending on review before the court of appeals.

The Commission denied the motions and dismissed the applications (Pet. App. A). It concluded that its Septem-

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[2]*American Public Gas Association* v. *Federal Power Commission*, No. 74-1020, filed January 4, 1974, voluntarily dismissed July 24, 1975.

[3]Opinion No. 699, 51 F.P.C. 2212. The Commission thereafter modified its order to increase the rate to 50 cents per Mcf. Opinion No. 699-H, issued December 4, 1974. The national rate orders were affirmed in *Shell Oil Co.* v. *Federal Power Commission*, 520 F. 2d 1061 (C.A. 5), certiorari denied *sub nom. California Co., et al.* v. *Federal Power Commission*, June 14, 1976, Nos. 75-1289, *et al.*

ber 1973 order was final and that petitioners' deliveries under their contracts with Sea Robin were therefore not subject to termination under 18 C.F.R. 2.75(n) (Pet. App. A-3 to A-4). The Commission also concluded that, under the provisions of its national rate orders, petitioners would not be entitled to the national rate even if the optional procedure certificates had not already been issued (*id.* at A-4 to A-5). Finally, the Commission stated that petitioners "have 'taken and enjoyed benefits of the optional procedure and may not [now] renounce the burdens * * *'" (*id.* at A-5).

2. On petition for review, the United States Court of Appeals for the Fifth Circuit affirmed (Pet. App. C). It held that the Commission's issuance of optional procedure certificates was a final order, that the pendency of a petition for review of that order in the court of appeals did not affect the order's finality under 18 C.F.R. 2.75(n), and that petitioners therefore were not entitled to terminate their contracts with Sea Robin and withdraw their certificates.

The court rejected petitioners' contention that "binding them to the certificates as issued is unfair because they never had the opportunity to choose the national rate structure" (Pet. App. C-13). Petitioners sought and received a price for their gas under the optional procedure some 35 percent above the area rate they would otherwise have been required to accept," and "[t]hey collected the higher rate for almost a year before the nationwide schedule was promulgated" (*ibid.*). Although petitioners sought "to erase all that had gone on before" once "[a] higher price [became] available," the court of appeals determined that "the Commission was within its authority, properly exercised, when it denied the erasure" (Pet. App. C-15).

3. Petitioners here renew their contention that they were entitled to withdraw their optional procedure cer-

tificates because the Commission's order issuing the certificates—then under review by a court of appeals on APGA's petition—was not a "final order" within the meaning of 18 C.F.R. 2.75(n). The contention was answered correctly by the court of appeals, which stated (Pet. App. C-10 to C-11; emphasis in original):

> The order of the Commission * * * issuing the certificates finally sanctioned and established the legal relationships among the Petitioners, Sea Robin, and the FPC. The order would not have been reviewable by the Court of Appeals under the terms of the Natural Gas Act had it not done so. 15 U.S.C. §717r(b). The fact that the decision was ripe for judicial review was the "touchstone of finality". *Blanco Oil Co.* v. *FPC*, 1973, 158 U.S. App.D.C. 257, 485 F.2d 1036, 1038.

A *complete* resolution of matters before an administrative or judicial tribunal does not wait for finality until an appeal is decided; it is final *unless and until* it is stayed, modified, or reversed. This basic concept is further bolstered by the unequivocal language of §717r(c) of the Natural Gas Act that "the commencement of proceedings [for review] . . . shall not, unless specifically ordered by the court, operate as a stay of the Commission's order". In the absence of a stay, the FPC's orders are entitled to have administrative operation and effect during the disposition of the proceedings. *Jupiter Corp.* v. *FPC*, 1969, 137 U.S. App.D.C. 295, 424 F.2d 783, 791.

We must interpret the word "final" as the parties must have understood it at the time they entered into the agreement *within the framework of the Natural Gas Act. Mitchell Energy Corp.* v. *FPC*, 5 Cir. 1975, 519 F.2d 36, 41; *Texas Eastern Transmission Corp.* v. *FPC*, 5 Cir. 1962, 306 F.2d 345, 347. The

> previously noted provisions of the Act all lead to the inescapable conclusion that Congress intended and the parties must have understood the Commission's action to be its final disposition of the matter.[4]

Petitioners argue that the District of Columbia Circuit might have set aside the Commission's final order on APGA's petition for review and that they might thereafter have had a right to terminate deliveries (Pet. 6). But it does not follow that petitioners had the same right *pending* judicial review. The possibility that a Commission order will be set aside does not make it any the less final for purposes of 18 C.F.R. 2.75(n).

In any event, petitioners would not have been entitled to the national rate even if they could properly have withdrawn their optional procedure certificates. The Commission made clear in Opinion No. 699-I (quoted at Pet. App. B-3) that it "did not intend that those producers [who had filed for certificates pursuant to the optional procedure] would be permitted to receive the national rate where such rate is more beneficial to the producer than the rate which was sought under the optional procedur[e] and where deliveries have commenced pursuant to the optional procedure."

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[4]The court noted that, under 18 C.F.R. 2.75(*l*), "[a] final order of this Commission, issuing a certificate as applied for, * * * shall constitute a final determination that the rates, charges and services, therein specified are just, reasonable, and required by the present and future public convenience and necessity."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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